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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION**

IN RE: McCLAIN FEED YARD, INC., McCLAIN FARMS, INC. and 7M CATTLE FEEDERS, INC., Debtors. ¹	CASE NO. 23-20084-7-rlj (Jointly Administered Cases) Chapter 7
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¹ The Debtors in these jointly administered Chapter 7 cases are: (a) McClain Feed Yard, Inc. (Case No. 23-20084), (b) McClain Farms, Inc. (Case No. 23-20885) and 7M Cattle Feeders, Inc. (Case No. 23-20886). All three cases are being jointly administered under the case number for McClain Feed Yard, Inc.

**RABO AGRIFINANCE LLC'S AND FOCUS MANAGEMENT GROUP USA, INC.'S
OBJECTION AND RESPONSE TO THE TRUSTEE'S UNAUTHORIZED AND LATE-
FILED "REPLY SUPPLEMENT" [DKT. 295] AND "FIRST AMENDED REPLY
SUPPLEMENT" [DKT. 296] TO THE TRUSTEE'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS FROM RABO AGRIFINANCE AND FOCUS
MANAGEMENT**

Rabo AgriFinance LLC (“**Rabo**”) and Focus Management Group USA, Inc. (“**Focus**”), through counsel, respectfully file this Objection and Response to the Trustee’s (a) “Reply Supplement” to the Trustee’s Motion to Compel, filed at 6:19 p.m. on September 10, as Dkt. 295, and (b) “First Amended Reply to Supplement” to the Trustee’s Motion to Compel, filed at 8:48 a.m. on September 11, as Dkt. 296. The “Reply Supplement” and the “First Amended Reply to Supplement” are collectively referred to herein as the “**Unauthorized Supplements**.¹”

I. The Court Must Either Refuse to Consider the Trustee's Unauthorized Supplements or Fully Consider the Counterarguments in this Brief.

The Trustee filed the Motion to Compel on July 26, 2024. [Dkt. 268] Rabo and Focus filed their joint response to the Motion to Compel on August 23, 2024. [Dkt. 284] The Trustee filed his reply to his Motion to Compel on August 30, 2024. [Dkt. 288] The Trustee also set a hearing on his Motion to Compel for September 11, 2024, at 1:30 p.m. The Trustee, through his counsel, then filed the Unauthorized Supplements at 6:19 p.m. on September 10, 2024, and at 8:48 a.m. on September 11, 2024, i.e., the evening before and the morning of the scheduled September 11 hearing.

The Unauthorized Supplements are anything but “supplements” to the Trustee’s timely filed original reply memorandum. In fact, they raise entirely new arguments by the Trustee, including that Rabo and Focus’s production of documents failed to comply with Federal Rule of

Civil Procedure 34(b)(2)(E). Because these new arguments were raised for the first time within just a few hours before the September 11 hearing, Rabo was unable to adequately respond to these new arguments at the hearing, or in a responsive brief filed prior to the hearing.

Given these facts, the Court must either refuse to consider the Unauthorized Supplements, or at least give Rabo a fair opportunity to respond to them. *See, e.g., Georgia Firefighters' Pension Fund v. Anadarko Petroleum Co.*, 99 F.4th 770, 774 (5th Cir. 2024) ("But when a party raises new arguments or evidence for the first time in a reply, the district court must either give the other party an opportunity to respond or decline to rely on the new arguments and evidence."); *Residents of Gordon Plaza, Inc. v. Cantrell*, 25 F.4th 288, 296 (5th Cir. 2022) ("[A] district court abuses its discretion when it considers new arguments raised for the first time in a reply brief without providing the non-movant an adequate opportunity to respond prior to ruling.") (cleaned up).

Given the lateness in filings and the fact that the Trustee's counsel has made entirely new arguments in those filings which Rabo has not had a meaningful opportunity to respond to, the Court should simply refuse to consider them, including the Trustee's new arguments about Federal Rule of Civil Procedure 34(b)(2)(E). However, as the new arguments were both extensively briefed and extensively argued by the Trustee at the September 11 hearing as part of an apparent "litigation by ambush" tactic, and as the Court specifically asked questions about Rule 34(b)(2)(E) at the hearing, Rabo and Focus feel they must put their response to those arguments in writing so that the Court has the benefit of their views on the matter.

II. Rule 34(b)(2)(E) does not Apply in this Rule 45 Dispute.

The Court will recall the discussion at the hearing about the “Pending Proceedings Rule” and Mr. Jobe’s statements regarding the same. Specifically, the Court will recall Mr. Jobe asserting that the Trustee issued Rule 45 subpoenas, instead of Rule 34 document requests, because Rule 45 provides the most protection to parties, like Rabo and Focus, that are the subject of a discovery request. In the same breath, however, the Trustee through Mr. Jobe also argued that Rabo’s production violated Rule 34(b)(2)(E). But if Rule 45 and its requirements apply to the subpoenas the Trustee served on Rabo, then Rule 34’s requirements clearly do not apply. And the Trustee has made no argument or assertion that Rabo’s production was deficient under Rule 45’s production standards.

Rule 45(e) contains express provisions setting forth a party’s duties in responding to a subpoena, including requirements for how documents are to be produced. Under that rule, and specifically under Rule 45(e)(1)(B), “[i]f a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably useable form or forms.” Fed. R. Civ. P. 45(e)(1)(B). While the Trustee’s subpoenas provide a definition of “Documents or Electronically Stored Information,” they say nothing about how documents are to be produced other than that for both physical and electronic documents, Rabo and Focus were to “initially provide only the electronic version.” Specifically, the Trustee’s subpoenas do not state that any documents produced must be “produced . . . in their original native file format (Word, Excel, Outlook message, .txt., etc.) with the same file names originally maintained . . . and either: (i) organized

as originally maintained (ex. Folder such as “BorrowingBaseReports”), or (ii) organized and labeled them (ex. Folders such as “Trustee’s Requests—Debtor Reporting.”)

Yet the Trustee now belatedly argues that those requirements do exist, and that they were not met (which in any case is not true, as discussed below). As the Trustee’s Unauthorized Supplements admit, and as Mr. Jobe also admitted at the hearing, some of the documents produced were indeed in native format, whereas other documents were produced in both PDF and .txt format. The Trustee takes no issue with the documents that were produced in native format, and indeed argues that this is how all of the documents needed to be produced. But that is not what Rule 45(e)(1)(B) says. Rather, the rule says documents should be produced either in the “form or forms in which [they are] ordinarily maintained, or in reasonably useable form or forms.” That is precisely what Rabo has done with this production. Indeed, many of the documents produced to the Trustee, such as the various notes, security agreements, credit agreements, deeds of trust, collateral inspection reports, etc., are maintained electronically by Rabo in a PDF format, and that is how they were produced here. That certainly satisfies Rule 45’s requirements that documents be produced in “reasonably useable form or forms.”²

Finally, the Trustee’s assertion that Rabo was required to “label” its document production is just wrong. Like most businesses in today’s modern world, Rabo’s records are generally maintained electronically and not in hard copy form. While Rule 34 does not even apply to this

² There is nothing in the language of Federal Rule of Civil Procedure 45 requiring a party to produce documents in original native file formats with original file names and either organized as originally maintained or organized and labeled to correspond to the document requests in a subpoena.

dispute as noted above, even if it did, “the rule 34(b)(2)(E)(i) requirement that documents be produced either in the usual course of business or labeled to correspond to the categories in the request does not apply to ESI.” *Anderson Living Trust v. WPX Energy Prod., LLC*, 298 F.R.D. 514, 515 (D.N.M. 2014).

III. Rabo’s Production Fully Complied with the Requirements of Federal Rule of Civil Procedure 34(b)(2)(E), and Counsel has Misrepresented the Form of Rabo’s Production to the Court.

Based on the new arguments in the Unauthorized Supplements, the Trustee’s counsel would have this Court believe that Rabo’s production did not include metadata for the documents and records that were produced, and that Rabo did not provide information to the Trustee showing the original file names as maintained by Rabo, how the documents were originally stored and categorized, etc. In fact, Mr. Jobe hammered home these precise arguments at the September 11, 2024 hearing. Unfortunately and disappointingly, these assertions are not true, and counsel has been less than candid with the Court about Rabo’s production.

Rabo’s production was overseen by Troy Mollerup, an attorney at Ray Quinney & Nebeker, Rabo’s lead counsel. Mr. Mollerup is the firm’s expert on document discovery, including the production of electronic discovery and the manner in which records are supposed to be produced in large cases with many documents such as this. Because of the lateness in filing of the Unauthorized Supplements which raised the Rule 34(b)(2)(E) arguments (again, these were filed the evening before and the morning of the September 11 hearing), Mr. Mollerup was unable to review and weigh-in on the Trustee’s Rule 34(b)(2)(E) arguments prior to the hearing. He has now done so. In fact, in addition to providing the Trustee with the PDF and .txt files, he

also provided the Trustee with the load files for all documents produced. Yet neither the Unauthorized Supplements nor Mr. Jobe's statements at the September 11 hearing mentioned this critical and dispositive fact.³

The load file that was produced to the Trustee contains all of the information that Mr. Jobe incorrectly told the Court was not provided. "A load file is a 'file that relates to a set of scanned images or electronically processed files, and indicates where individual pages or files belong together as documents, to include attachments, and where each document begins and ends,' and may also include 'data relevant to the individual documents, such as metadata, coded data, text, and the like.'" *Aguilar v. INS*, 255 F.R.D. 350, 353 n. 3 (S.D.N.Y. 2008) (citations omitted). Metadata, in turn "is electronically-stored evidence that describes the 'history, tracking, or management of an electronic document.' It includes the 'hidden text, formatting codes, formulae, and other information associated' with an electronic document." *Id.*, at 353 (quoting *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 647 (D. Kan. 2005); see also *Auto Techs. Ltd. P'Ship v. Automationdirect.com, Inc.*, 248 F.R.D. 55, 557 n.1 (N.D. Ill. 2008) (Metadata includes "all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records").

Simply put, the format of Rabo's document production to the Trustee is the most common and the most preferred format used in litigation for at least the last twenty years. "[I]f a party wants metadata, it should 'Ask for it. Up front. . .'" *Aguilar*, 255 F.R.D. at 357. Even

³ If necessary, Mr. Mollerup can provide a sworn declaration to the Court averring to the fact that the load files were provided to the Trustee's counsel as part of Rabo's production.

though the Trustee's subpoenas did not ask for metadata, Rabo provided the Trustee's counsel with a metadata load file and multipage PDFs with accompany text files. The metadata load file contains all the metadata from the native files collected by Rabo, including filenames, authors, creation dates, email subjects, email to, email from, email cc, etc. Rabo's production can be loaded into all legitimate eDiscovery review tools in use today, and once loaded, the PDF files and the files' metadata are fully searchable and sortable. This production format, which includes the native file metadata, fully complies with the requirement that documents be produced as the records are kept in the ordinary course of business. Moreover, Rabo actually went above and beyond to make its production reviewer friendly by providing the image files as multipage PDFs. Typically, the document images are produced as single page TIFF files which make a manual review without a review platform exceedingly difficult. Mr. Jobe's statements to the Court that Rabo's production failed to satisfy the requirements of Rule 34(b)(3)(E) because Rabo failed to provide metadata is either deliberately misleading, or he is unfamiliar with standard discovery practices in large cases involving large document productions. In either event, these untimely Rule 34(b)(2)(E)'s objections are completely without merit and must be rejected. Further, the Trustee's counsel should formally withdraw these factually incorrect arguments from the record.

IV. The Trustee's New Rule 34(b)(2)(C) Arguments Should be Rejected.

The Unauthorized Supplements also contain new arguments regarding Rule 34(b)(2)(C) with respect to documents "withheld due to a non-privilege objection." Because these arguments

also were first made in pleadings filed hours before the hearing on the Trustee's Motion to Compel they should be ignored by the Court, based on the authorities set forth above.

Moreover, even if the Court does consider them, the Court should reject them. As an initial matter, the Trustee served Rule 45 subpoenas, not Rule 34 document requests. Yet the Trustee fails to assert, let alone show, that Rabo's production fails to satisfy the production requirements imposed by Rule 45. Again, it is ironic that the Trustee argued at the September 11 hearing that the Trustee served subpoenas because he wanted to provide Rabo and Focus the broader protections afforded by Rule 45 to non-parties, and yet the Trustee then argues that Rabo failed to satisfy the Rule 34 requirements that are applicable only to parties.

In any event, even if Rule 34 applies, as previously briefed, a party need not respond to document requests that are facially overbroad or unduly burdensome on their face. [See arguments and case law cited in Sections IV and V of Dkt. 284] As Rabo showed the Court at the September 11 hearing, the Trustee's subpoenas are both facially overbroad, and unduly burdensome on their face to respond to. As just one example, the definition of "You" in the subpoenas included not only Rabo, but also its officers, directors, members, employees, attorneys, agents, representatives, and/or anyone else acting on Your behalf, as well as your predecessors, successors, assigns and affiliates as that term is defined in 11 U.S.C. § 101(2)." (emphasis added). Then, after lumping anyone associated with Rabo into the definition of "You," including Rabo's retained outside counsel, the Trustee's subpoenas demand production of a broad range of documents with no time limitations whatsoever. For example, the subpoenas demand production of any communications "between You and any third party referring or

relating to the Debtor or a Debtor Affiliate, including the Debtor/Affiliate Accounts or any Debtor/Affiliate Loans,” and “all documents or electronically stored information referencing any of the Debtors or the Debtors Affiliates.”

As explained at the September 11 hearing, these facially overbroad requests necessarily ensnare within their scope every privileged communication that Rabo’s retained outside attorneys have had with their clients regarding the Debtors or their accounts or their loans. These facially overbroad requests also necessarily encompass within their scope every communication, privileged or not, that Rabo’s outside attorneys have had with their staff members regarding this case or the Debtors, including such mundane communications as emails directing staff members to file documents in this case or to input billing entries into the firm’s billing software. These facially overbroad requests also necessarily encompass within their scope a requirement that Rabo produce (a) every third party record it has obtained regarding the Debtors from Rule 2004 subpoenas even though the Trustee already has all of those records, and (b) every communication that Rabo’s outside attorneys have had with other attorneys involved in this case, including email communications with the Trustee and/or the Trustee’s attorneys themselves.

At the September 11 hearing, Mr. Jobe basically conceded that the document requests were facially overbroad and improper. In an effort to ameliorate the clear problem caused by that indisputable fact, he suggested to the Court that the Trustee’s document requests be limited in time to the period prior to the Petition Date, which was April 28, 2023. While Rabo agrees that the Trustee’s document requests must be limited in time, the applicable time-period should be prior to March 15, 2023, not April 28, 2023, at least with respect to communications that would

be protected by the attorney-client privilege or work product doctrine. The reason for that is because March 15, 2023, is the day that outside counsel was retained to represent Rabo's interests in litigation regarding the Debtors.

Finally, with respect to the Trustee's complaint that Rabo has failed to explain the examples or categories of non-privileged documents that Rabo says it should not have to produce, Rabo invites the Court to review the emails between Rabo's counsel and the Trustee's counsel contained in Dkts. 294 and 297, as those emails do exactly what the Unauthorized Supplements claim has not been done—provide the categories of non-privileged documents that will not be produced. But to make it clear and provide the Trustee and his counsel in one place with the list they claim is missing, Rabo believes that it should not have to produce any non-privileged communications or documents falling under the following categories, even if the communications or documents fall within the scope of the Trustee's facially overbroad document requests:

1. Any non-privileged communications created or generated from and after March 15, 2023, that Rabo's outside attorneys (including staff members) have had with anyone (including but not limited to communications between Rabo's outside attorneys and attorney staff members and communications between Rabo's outside attorneys and staff members and either the Trustee or attorneys or staff members for the other parties in these cases) even if those communications refer or relate to the Debtor or a Debtor Affiliate, including the Debtor/Affiliate Accounts or any Debtor/Affiliate Loans;

2. Any documents or electronically stored information referencing any of the Debtors or the Debtor Affiliates, including the Debtor/Affiliate Accounts or any Debtor/Affiliate Loans that Rabo first came into possession of after the April 28, 2023 Petition Date, provided such documents or electronically stored information (or copies thereof) are already in the Trustee's possession, custody or control (such as all of the documents produced to Rabo in response to Rule 2004 subpoenas, copies of which were then provided to the Trustee); and
3. Any documents or electronically stored information constituting Rabo's business records that have already been produced to the Trustee, formally or informally, in this case.

V. Rabo Should not be Required to Provide a Privilege Log Absent a Narrowing of the Trustee's Facially Overbroad Document Requests, Because Preparing a Privilege Log in and of Itself Would be Unduly Burdensome.

The final argument in the Trustee's Unauthorized Supplements relates to privileged documents and privileged communications. Even though the Trustee deliberately and intentionally drafted his document requests to ensnare thousands of documents that the Trustee certainly knows are privileged (such as all of the many, many communications that Rabo's outside attorneys have had with their clients regarding this case), the Trustee suggests that Rabo has somehow waived the privilege by not providing a privilege log concerning those privileged communications.

That is not the law, and the Court should not reward counsel's improper conduct in deliberately drafting document requests designed to capture thousands of privilege communications in their all-encompassing web. *See Williams v. City of Dallas*, 178 F.R.D. 103, 115 (N.D. Tex. 1998) (holding that because issuing party served "facially overbroad" subpoenas,

“Babcock and Carter had no obligation to undertake the task of lodging objections to a potentially vast array of protected material that technically fell within the scope of the subpoenas,” and that there was no waiver of any privileges by failing to lodge specific objections or provide a privilege log); *Hamilton v. Ogden Weber Tech Coll.*, 2017 WL 5633106, at *4 (D. Utah Nov. 21, 2017) (“Yet here, even providing a privilege log responsive to this request is overly burdensome because Defendant would be forced to describe all communications with its attorneys.”).

As noted above (and at the hearing), Rabo’s outside counsel was retained on or about March 15, 2023, to provide legal services to Rabo concerning the Debtors, and since that time Rabo’s outside attorneys have had many hundreds if not thousands of privileged communications with their clients about this case, and with the consulting and potentially testifying experts that Rabo’s outside attorneys have retained to assist counsel. Providing a privilege log of those communications would in and of itself impose an undue burden and needless expense on Rabo as it would take countless hours and costs tens of thousands of dollars to complete such an inappropriate task.

As Rabo’s counsel also noted at the September 11 hearing, however, Rabo has no objection to providing a privilege log for any communications or documents concerning the Debtors or any Debtor Affiliates or any Debtor Accounts or Debtor Loans that are withheld from production, provided those communications or documents were first created or generated prior to the retention of Rabo’s outside counsel on or about March 15, 2023. An example of the type of documents or communications for which Rabo can provide a privilege log would be for

communications between Rabo business people and Rabo's in-house attorneys from loan origination in 2018 through March 15, 2023, regarding or relating to the Debtors or the loans Rabo made to the Debtors, to the extent such documents exist and are withheld from production on the grounds of privilege.

The Court here is faced with a situation where the Trustee has served Rabo and Focus with document requests that are overbroad on their face and unduly burdensome to respond to on their face. That makes it extremely burdensome and impractical, if not close to impossible, for any privilege log to be prepared in this case. Before the Court even considers the issue of a privilege log, it should find that the Trustee's subpoenas must be narrowed both in time and wording so that the subpoenas do not, on their face, intentionally capture communications that are protected by the attorney-client privilege or the work product doctrine. Specifically, the Court should order that Rabo need not produce any privileged or otherwise protected communications or documents concerning the Debtors or any Debtor Affiliates or any Debtor Accounts or Debtor Loans consistent with clear and controlling rules and case authority, and in the event the Court chooses to order Rabo to produce any further documents, that Rabo be required to provide a privilege log for only those communications or documents that were created or generated prior to March 15, 2023 and that are withheld from production on the basis of any applicable privilege or rule.

WHEREFORE, for the additional reasons set forth herein, the Trustee's Motion to Compel should be denied.

DATED this 13th day of September, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2024, the foregoing **RABO AGRIFINANCE LLC'S AND FOCUS MANAGEMENT GROUP USA, INC.'S OBJECTION AND RESPONSE TO THE TRUSTEE'S UNAUTHORIZED AND LATE-FILED "REPLY SUPPLEMENT" [DKT. 295] AND "FIRST AMENDED REPLY SUPPLEMENT" [DKT. 296] TO THE TRUSTEE'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM RABO AGRIFINANCE AND FOCUS MANAGEMENT** was filed with the Clerk of the Court in the above-entitled case, which sent notice of electronic filing to all electronic filing users in the case.

/s/ Michael R. Johnson _____
Michael R. Johnson

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